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Nos. 82-1005, 82-1247 & 82-1591

In the Supreme Court
OF THE
United States

OCTOBER TERM 1983

CHEVRON U.S.A. INC., a corporation, et al.,
Petitioners,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
Respondents.

REPLY BRIEF FOR PETITIONER CHEVRON U.S.A. INC.

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PRELIMINARY STATEMENT

Respondents have failed to come to grips with the arguments raised in the opening brief for petitioner Chevron U.S.A. Inc. Respondents repeatedly concede that the statutory provisions of the Clean Air Act define a stationary source as a "building, structure, facility or installation" (Resps.' Br., pp. 23, 24, 27, 28). But, as discussed in our opening brief, the EPA regulations in question here simply conformed the regulatory definition of stationary source to that statutory definition; EPA defined stationary source as "any building, structure, facility or installation," the precise definition set forth in the Act. The terms "building, structure [or] facility" have been reasonably construed by EPA to mean, essentially, an entire plant under both the 1981 regulations *and the 1980 regulations advocated by*

respondents. Thus, respondents' case rests on the untenable assertion that EPA abused its agency discretion by defining "installation" to mean an entire plant as well.

Moreover, the legislative history of the Clean Air Act does not support respondents' assertions that Congress intended to preclude EPA from adopting the bubble concept. Respondents ignore the finding of the court of appeals that "the legislative history is at best contradictory" (Chev.Pet.Appx., p. A-17, n. 39). With respect to the legislative history of the 1977 amendments to the Act, respondents assert that Congress in 1977 adopted EPA's 1976 Offset Ruling. But the 1976 Emissions Offset Ruling is itself not explicit as to what constitutes a "source." At most, that Ruling suggested that a "source" would be defined as a new "facility, building, structure, installation or operation" (JA 21)—a definition almost identical to that adopted by EPA in the challenged 1981 regulations in question.

Respondents attempt to confuse the matter by asserting that EPA, in adopting a plantwide definition of "stationary source" in nonattainment areas, reversed a "long-standing" rule which allegedly had been in effect since 1971. To put it succinctly, this argument is absurd. The Part D provisions of the Clean Air Act which deal with nonattainment areas were not even in existence in 1971. Congress passed those provisions as part of the Clean Air Act Amendments of 1977, and EPA made no attempt to define "source" under Part D until 1979.

At the very least, Congress has left to EPA the task of defining "stationary source" under the nonattainment pro-

visions of the Clean Air Act. Neither the court of appeals nor this Court may substitute its judgment for that of EPA on this basic policy issue.

I. THE EPA REGULATIONS IN QUESTION SIMPLY CONFORM THE REGULATORY DEFINITION OF "STATIONARY SOURCE" TO THE DEFINITION SET FORTH IN THE CLEAN AIR ACT.

Respondents have made no attempt to address the fact that the EPA regulations in question simply conform the regulatory definition of "stationary source" to the definition in the Clean Air Act. Instead, respondents concede that the Clean Air Act defines a stationary source as a "building, structure, facility or installation"—the precise definition adopted by EPA in the challenged regulations (Chev.Br., pp. 12-13). It is significant that respondents do not identify any principle of law which would preclude an agency from conforming its regulations to the controlling statutory language. EPA acted rationally, reasonably, and well within both the terms of the Act and its agency discretion in promulgating the 1981 regulation.

Respondents attempt, as they did in the court of appeals, to confuse the matter by asserting that "stationary source" must be defined so as to include units within each plant, such as individual boilers or blast furnaces (Resps.' Br., p. 26). But nothing in the Clean Air Act requires that a "stationary source" be defined so as to require permits for each individual piece of equipment in a plant.[1] EPA acted well within

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[1]Respondents rely upon the court of appeals prior decision in *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C.Cir. 1978) 578 F.2d 319 in asserting that "stationary source" has been defined in section 111 of the Act to "denote discrete industrial units of production and operation" (Resps.' Br., p. 8). As discussed in our prior briefs (Chev.Br., pp. 11-12, n. 7; Chev.Pet., pp. 8-10), the *ASARCO*

its discretion in 1981 when it repealed its prior regulations which had defined "installation"—one of the terms in the stationary source definition—to include all identifiable pieces of process equipment (Chev.Br., p. 13)

With respect to the remaining terms in the stationary source definition—"building, structure [or] facility"—there can be little doubt that these terms can reasonably be defined to encompass an entire plant. Even the 1980 regulations, which respondents now embrace as the correct definition (Resps.' Br., p. 15), defined "building, structure, or facility" to "mean, essentially, an entire plant" (Chev. Pet. Appx., p. A-9; 45 Fed.Reg. 52746 (Aug. 7, 1980); J.A.

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decision has been widely criticized and cannot support the result in the instant case (Landau, *Alabama Power Co.* v. *Costle:* An End to a Decade of Controversy over the Prevention of Significant Deterioration of Air Quality? (1980) 10 Envtl.L. 585, 626; see An Overview of the Bubble Concept (1982) 8 Colum.J.Envtl.L. 137, 151; Rhinelander, The Bubble Concept: A Pragmatic Approach to Regulation under the Clean Air Act (1981) 1 Va.J.Nat.Resources L. 177, 215). Moreover, the *ASARCO* decision was expressly limited to the New Source Performance Standards in section 111; as the court of appeals decision in *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 demonstrates, the *ASARCO* decision cannot be read to prohibit use of the plantwide definition in contexts outside of section 111 (Chev.Br., p. 11; Chev.Pet., pp. 8-10). The state implementation plan provision, section 110, involved in this case is a separate regulatory system which is distinct from section 111: While section 111 is oriented only towards developing technology standards on an industry-by-industry, equipment-by-equipment-type basis, section 110 is oriented towards meeting air quality standards in nonattainment areas (see EPA Br., pp. 4, 7). In light of section 110's primary goal of assuring reasonable further air quality progress in nonattainment areas, the arguments in favor of a plantwide definition for section 110 are particularly compelling. The plantwide definition is consistent with section 110's purpose of improving overall air quality rather than section 111's much narrower focus on the technology of particular equipment or industries.

88). Respondents' bare assertion that "the terms 'building' and 'structure' cannot [be] reasonably defined as anything else besides individual industrial units" (Resps.' Br., p. 30) is thus inconsistent with the 1980 dual definition which respondents proclaim properly "maintained the historical scope of the [new source] review provisions" (Resps.' Br., p. 15). The fact of the matter is that "building, structure [or] facility" can be, and has been, reasonably construed on a plantwide basis.

Respondents' numerous references to the five conditions for construction of *major* stationary sources (Resps.' Br., pp. 2-4, 23-25, 32) are irrelevant; respondents do not even attempt to refute our demonstration that a project which results in a de minimis increase in plantwide emissions (or often a net decrease in plantwide emissions) is simply not a major stationary source within the meaning of the nonattainment provisions of the Clean Air Act. As discussed in our opening brief, there are compelling reasons for allowing a project to proceed in a nonattainment area if the net emissions increase from the plant as a whole is below the minimal threshold levels allowed by statute (Chev.Br., pp. 18-20).

Implicit in respondents' argument on this point is the notion that an individual piece of equipment in a plant modification or expansion which will emit 100 tons of pollution per year must be subject to the same conditions as a similar piece of equipment in a new plant construction, *even if the plant modification or expansion as a whole would result in net decreases in emissions.* But it is clear that the impact of the two projects upon air quality is totally different—new plant construction *increases* emissions in the nonattainment area, while a project to expand or modify a plant may

allow replacement of old, poorly controlled facilities and *reduce* emissions in the area. Respondents fail to explain how a construction moratorium on projects which will result in reduced emissions in nonattainment areas is consistent with the terms or goals of the Clean Air Act.

II. THE EPA REGULATIONS IN QUESTION ARE IN ACCORD WITH THE LEGISLATIVE HISTORY AND PURPOSES OF THE CLEAN AIR ACT.

In arguing that the legislative history of the Clean Air Act precludes a plantwide definition of "stationary source," respondents ignore the finding of the court of appeals that "the legislative history is at best contradictory" (Chev.Pet. Appx., p. A-17, n. 39). Hence, according to respondents, it is irrelevant that the court of appeals found that "Congress did not advert specifically to the bubble concept's application to various Clean Air Act programs" (Chev. Pet.Appx., p. A-17, n. 39).

There is no merit to the several fragments of legislative history advanced by respondents in this regard. We discuss each briefly:

1. Contrary to respondents' assertion (Resps.' Br., p. 33), the 1976 Senate bill did not address the issue of whether "source" should be given a plantwide definition or a dual definition. The specific phrase relied upon by respondents—"a facility proposed for construction or modification at an existing site or plant"—was abandoned in the 1977 conference bill which led to the 1977 Amendments (EPA Br., pp. 44-46).

2. There is likewise no basis for the suggestion (Resps.' Br., p. 34) that the 1976 Offset Ruling precluded a plantwide

definition of source. That ruling indicated that a source would be defined as a "structure, building, facility, installation or operation" (JA 21), but did not discuss whether those terms would, in turn, be defined to include only plants or to include individual pieces of equipment as well. In any event, there is no evidence that Congress intended merely to codify the 1976 Offset Ruling when it adopted the 1977 Amendments.

3. Again, respondents' citations to the 1977 legislative history of the Amendments do not support their assertion (Resps.' Br., pp. 34-35) that the nonattainment provisions must be applied to units or pieces of equipment within plants. As discussed in EPA's opening brief, it is the House version of the nonattainment program which was adopted by the 1977 conference (EPA Br., p. 46); yet respondents rely almost entirely upon the legislative history in the Senate. Respondents' cryptic references to the House bill simply do not address the plantwide definition (see Resps.' Br., pp. 35-36).

4. The extremes to which respondents (and the United Steelworkers amicus) go in an attempt to bolster their claims of favorable legislative history are perhaps best illustrated by their reliance upon the legislative history of the 1981 Steel Amendments (Resps.' Br., pp. 14-15). In fact, there is no legislative history in those amendments which addresses the definition of "stationary source," the bubble concept, or any other issues relevant to this case. The passage quoted by respondents (Resps.' Br., p. 15) is taken completely out of context; the full paragraph in the legislative history states:

> *"The Committee proposal is intended to encourage additional capital investments in steelmaking operations.* It is anticipated that the industry will use this opportunity to modernize the American steel industry by building modern continuous casters, converting existing open hearth shops to basic oxygen furnace operations or undertaking similar projects to improve the competitive posture of the industry. *Additional capital investments under the Committee proposal are those investments that would not be made during the same time period if extensions of time for compliance were not granted.* The deferred pollution control funds are not to be diverted to routine capital investment needed to maintain existing productive capacity at a steel mill. For example, the Committee does not envision that a routine blast furnace reline, coke oven end-flue rebuild or other similar projects would qualify as 'additional capital investments in iron- and steel-production operations'" (H.R.Rep. No. 121, 97th Cong., 1st Sess. 12 (1981), reprinted in [1981] U.S. Cong.& Admin.News 63; emphasis added).

In view of the fact that the steel industry must build and modernize casters, open hearth shops, and furnaces, it is not surprising that the House Report used those terms in describing the capital investments encouraged by the Amendments. But nothing in either the quoted passage or any other part of the 1981 legislative history suggests that each caster, each open hearth shop, or each furnace must be deemed a separate "stationary source." Respondent's assertion that the legislative history describes casters, furnaces or shops as "examples of the type of projects that would be subject to LAER and the other new source permitting requirements" (Resps.' Br., p. 15) is thus refuted by the legislative history relied upon by respondents and quoted in full above.

Respondents' briefs make a pro forma attempt to argue that the nonattainment provisions of the Act do not have the two main purposes of allowing reasonable economic growth and allowing states greater flexibility. The greater part of their briefs, however, disregard Congress' clear and unambiguous statement of purposes and assume that flexibility and economic growth are irrelevant.

Thus, for example, respondents do not dispute the fact that plantwide definition and the bubble concept will afford the states flexibility (see Chev.Br., pp. 15-17). In fact, Pennsylvania and the other state amici assert that the plantwide definition should be barred *because the plantwide definition would allow the states greater flexibility:* The state amici arguing that allowing states to incorporate the plantwide definition in their attainment plans will somehow create "interstate pressures to weaken emission standards" (Penn.Amici Br., p. 7). The state amici's assertions are wide of the mark: As discussed in our opening brief, each state must demonstrate to EPA that its overall air quality plan assures reasonable further progress toward meeting air quality standards (Chev.Br., p. 17). Thus, allowing states the option of including the plantwide definition in their air quality plans could not possibly create competition among states to weaken emission standards. The only interstate competition, if any, would be to encourage states to develop cost-effective, efficient air quality plans which are appropriate to the conditions of the particular state. That is the very sort of competition which Congress envisioned in setting forth the purpose of allowing states greater flexibility.

Respondents have also made no attempt to dispute the fact that the plantwide definition will allow reasonable

economic growth to continue in nonattainment areas while reasonable further progress is made to attain air quality standards (see Chev.Br., pp. 17-19). Instead, respondents assert that use of the plantwide definition will "skew" economic growth in favor of established firms in an area (Resps.' Br., pp. 40-41; see also Penn.Amici Br., pp. 11-13). Hence, respondents argue that the plantwide definition discriminates against a newcomer who wishes to build a particular facility at a new site, and favors an established firm who wishes to build a similar facility at an existing plant. Respondents' assumption that the two firms are "similarly situated" (Resps.' Br., p. 41) simply strains credulity. A newcomer who wishes to build a new facility which will emit 100 tons per year of a particular pollutant is by no means similarly situated as an established firm who wishes to replace an old facility currently emitting 200 tons per year with a new facility which will emit 100 tons per year. The established firm's modernization project will result in a 100 ton per year net *reduction* in emissions; the newcomer's project would result in a 100 ton per year net *increase* in emissions. Respondents fail to come to grips with the facts that the plantwide definition encourages modernization and expansion of industrial plants, in accord with the legislative history and purposes of the Clean Air Act.

III. EPA ACTED REASONABLY IN PROMULGATING REGULATIONS USING THE BUBBLE CONCEPT IN NONATTAINMENT AREAS.

Throughout these proceedings, respondents have ignored the limited scope of judicial review of an agency's administrative action. Notably, respondents do not even attempt to respond to the principle in *Train v. Natural Resources Def. Council* (1975) 421 U.S. 60, that where an adminis-

trative agency adopts regulations implementing a "sufficiently reasonable" construction of a statute, a court of appeals is precluded "from substituting its judgment for that of the Agency" (421 U.S. 87).

The court of appeals did not, and could not, find EPA's regulations to be unreasonable. This is not a case where an agency adopted an unreasonable construction of a statute. Consistent with the provisions of the Clean Air Act, EPA adopted a plantwide definition of "stationary source" to allow states greater flexibility in developing nonattainment programs and to reduce regulatory complexity (Chev.Br., p. 11). Nevertheless, the court of appeals substituted its judgment for that of EPA and Congress, relying solely on its own policy judgment that the bubble concept would cause unacceptable harm to air quality. But it is for Congress to define the de minimis emissions increases which are acceptable and consonant with achievement of attainment in nonattainment areas, and it is for EPA to fashion regulations to meet those levels.

There is also no merit to respondents' assertion that EPA's 1981 plantwide definition "is a sharp break with the long-standing prior rule" (Resps.' Br., p. 42). Respondents' assertion that since 1971 EPA's new source review applied to individual units within plants (Resps.' Br., pp. 15-19, 42-43) is simply wrong:

1. The Part D provisions of the Clean Air Act which deal with nonattainment areas were not even in existence until Congress passed the Clean Air Act Amendments of 1977.

2. Respondents concede that the 1971 EPA regulations contain no definition of "stationary source" (Resps.' Br.,

p. 15). The 1973 EPA regulations used the terms "facility, building, structure, [or] installation" (Resps.' Br., p. 16) — the same terms used in the 1981 regulations challenged by respondents.

3. Similarly, the 1976 Offset Ruling relied upon by respondents defined a "source" as a "facility, building, structure, installation or operation" (JA 21). Nothing in the 1976 Offset Ruling suggests that this definition was intended to apply to individual units or pieces of equipment within a given plant.

4. EPA made no attempt to define "source" under the Part D nonattainment provisions until 1979. The history of EPA's 1979 proposal to allow states with approved state plans to use a plantwide definition of source is set forth in EPA's opening brief (EPA Br., pp. 9-11).

Moreover, nothing in the record supports respondents' assertion that EPA "fail[ed] to consider an important aspect of the problem" (Resps.' Br., p. 42). Respondents argue that EPA failed to consider whether the plantwide definition would increase pollution in the aggregate and, in particular, failed to provide empirical evidence that the plantwide definition would reduce pollution (Resps.' Br., pp. 25-26, 44-47). The rule of law thus urged would require an agency to produce empirical evidence showing the superiority of its proposed rule (the plantwide definition) over the prior rule (the dual definition). Such a standard would be contrary to both common sense and established legal principles. In *Motor Vehicle Mfrs. Ass'n.* v. *State Farm Mut.* (1983) 103 S.Ct. 2856, for example, this Court held that "[t]he agency must explain *the evidence which is available,* and must offer a 'rational connection between

the facts found and the choice made' " (103 S.Ct. 2871; emphasis added). There is no requirement that exhaustive empirical data be developed to support the proposed rule, especially where, as here, no empirical evidence was ever offered to support the prior rule.

Rescission or modification of a prior rule is subject to the same "arbitrary and capricious" test as is applied to adoption of new rules (103 S.Ct. 2865). Because "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances," all that is required is a "reasoned analysis" (103 S.Ct. 2874). This Court will uphold even "a decision of less than ideal clarity if the agency's path may reasonably be discerned" (103 S.Ct. 2867). Here there can be no doubt as to EPA's reasoned analysis: EPA reasonably decided to conform the regulatory definition of "stationary" source to the definition in the Clean Air Act in order to allow states greater flexibility and to reduce regulatory complexity. The basis for this decision was carefully articulated by EPA and should be upheld by this Court.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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